IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

NO. 77-6817

MAURICE McELWEE,
Petitioner.

V.

STATE OF TEXAS

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

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The Petitioner, Maurice McElwee, prays that a writ of certiorari issue to review the opinion and judgment of the Court of Criminal Appeals of the State of Texas rendered in these proceedings on March 15, 1978 by Panel, and the denial of Petitioner's Motion for Rehearing En Banc on April 5, 1978.

OPINIONS BELOW

The opinion of the Court of Criminal Appeals by Panel of three judges is unreported and appears at Appendix A, infra, pp.11-17 Petitioner's Motion for Rehearing En Banc was overruled without written order or opinion.

JURISDICTION

The order or judgment and opinion of the Court of Criminal Appeals of the State of Texas by a three-judge panel was delivered and rendered on March 15, 1978. See Appendix A, p. 11. The overruling of petitioner's Motion for Rehearing En Banc occurred on April 5, 1978. This petition for certiorari was filed less than 90 days from the aforesaid dates. The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3).

QUESTIONS PRESENTED

1. Whether the courts of the State of Texas may require that in a state criminal prosecution, jeopardy does not attach until the jury is selected and sworn and the defendant pleads to the indictment, although this Court has held that jeopardy attaches when the jury is selected and sworn, under the 5th Amendment of the U. S. Constitution.

2. Whether under the 5th Amendment to the U. S. Constitution, petitioner was twice placed in jeopardy for the same alleged offense, after a jury had been empanelled and sworn to try Petitioner's case, and then discharged by the trial judge over Petitioner's objection because the district attorney wanted to reindict Petitioner with prior convictions alleged for enhanced punishment, and Petitioner was later tried and convicted of the same charge before a second jury.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment V:

> "... nor shall any person be subject for the same offense to be twice put in jeopardy of life and limb ..."

Constitution of the United States, Amendment XIV:

> "... nor shall any state deprive any person of life, liberty, or property without due process of law ..."

Article 1, Section 14, Texas State Constitution

"No person, for the same offense, shall be twice put in jeopardy of life or liberty, ..."

STATEMENT OF FACTS

The facts relevant to the questions presented are uncontroverted and therefore may be introduced in summary fashion.

In October 1974, petitioner was indicted by an Angelina County, Texas grand jury for the murder of Joe Kirkwood. The indictment did not allege any prior felony convictions. The case was set for trial on February 4, 1975.

In preparation for the trial, Petitioner subpoenaed eleven witnesses and filed six pre-trial motions. No continuances or postponements had been requested by either side. Petitioner timely filed a written election that the jury assess any punishment in his case.

On February 4, 1975, both sides extensively voir dired the jury panel, and a twelve-member jury was selected and sworn. The jury was told to return on February 7, 1975 to begin the testimony.

On February 7, 1975, the court postponed the trial until February 10, 1975 and told the jury to return on that date. The Court scheduled a hearing on motions for 3:00 p.m. At that time, the district attorney moved that the case be dismissed, because that very day he had found out about some prior felony convictions of Petitioner, and he wanted to reindict Petitioner and allege prior convictions for enhanced punishment. The convictions had at all times been on file and indexed in the District Clerk's office in Angelina County, Texas. Petitioner objected to the dismissal, but the court granted the motion. Petitioner filed a written exception to the court's dismissal, based on double jeopardy and the 5th and 14th amendments.

In March, 1975, petitioner was again indicted for the murder of Joe Kirkwood, with convictions alleged for enhanced punishment. Petitioner filed his sworn plea of former jeopardy, setting out his contention under federal law that jeopardy had attached in the previous case when the jury was selected and sworn, and that no manifest necessity existed for the granting of a mistrial or dismissal of that cause and discharging of the jury. This special plea was overruled by the trial judge.

The case was again called for trial on December 8, 1975. Petitioner went to trial before another jury and was found guilty. Petitioner was sentenced to 99 years in the Texas Department of Corrections, with one prior felony conviction being used for enhancement.

Petitioner appealed his case to the Court of Criminal Appeals of the State of Texas, the highest state criminal appellate court. Petitioner's first ground of error on appeal was that the trial court erred in overruling Petitioner's special plea of former jeopardy in that jeopardy had attached in the prior proceeding, and that no manifest necessity existed for the dismissal of that proceeding.

The case was argued before a three-judge panel of the Court of Criminal Appeals, which held that the Texas rule as to when jeopardy attaches would not be changed in line with federal law, even though the court recognized that federal law was controlling. See opinion, Appendix A., p. 12 , delivered on March 15, 1978.

Petitioner made a Motion for Rehearing En Banc, citing the Bretz v. Crist case, infra, but the motion was overruled without order or opinion.

Petitioner is still confined in the Texas Department of Corrections, Huntsville, Texas, awaiting the outcome of this proceeding.

REASONS FOR GRANTING THE WRIT

This case is virtually identical with the questions presented in the case of Crist v. Cline, which is presently pending before this court. (Appeal accepted by this Court on 3-27-77 in the companion cases styled Bretz v. Crist and Cline v. The State of Montana, CA - 9, 546 F 2d 1336 (1976)). In the present case, the courts of the State of Texas have a different rule on the attachment of jeopardy than does the U. S. Supreme Court. The question remains, does the 5th Amendment to the U. S. Constitution require that jeopardy attaches in all state criminal prosecutions, as well as federal prosecutions, when the jury is selected and sworn, or, in any event, at some time prior to the selection and swearing of the jury, but in no event later than that time?

The Court of Appeals for the Ninth Circuit and the litigants before this Court in the Crist case have probably articulated Petitioner's arguments as well as can be done. Therefore, Petitioner will discuss mainly how the Texas law evolved to be different from the federal law, and the facts and circumstances in this case which allow Petitioner's rights to be prejudiced in contravention of the 5th Amendment.

In the old cases of Anderson v. State, 7 SW40 (Tex.Cr.App. 1886), Yerger v. State, 41SW621 (Tex.Cr.App. 1897), and Steen v. State, 242SW1047 (Tex.Cr. App. 1922), the rule in Texas began to be formed that jeopardy does not attach until the defendant pleads to the indictment. In the very same breath, the court was quoting the legal scholar, Cooley:

> "A person is in legal jeopardy when he is put upon trial, before a court of competent jurisdiction, upon indictment or information which is sufficient in form and substance to sustain a conviction, and a jury has been charged with his deliverance. And a jury is said to be thus charged when they have been impaneled and sworn. The defendant then becomes entitled to a verdict which shall constitute a bar to a

new prosecution; and he cannot be deprived of this bar by a nolle prosequi entered by the prosecuting officer against his will, or by a discharge of the jury and continuance of the case."

Cooley's Const. Lim. (15th Ed.) 404.

However, somehow, the Court came up with the new rule that appears to conflict with Cooley on its face. This Texas rule has been followed in Texas as late as Lockridge v. State, 522 S.W. 2'd 526 (Tex.Cr.App. 1975). The decision in Lockridge is poorly reasoned and ignores and misinterprets the federal law which was urged. The court stated that the federal rule that jeopardy attaches when the jury is selected and sworn was dictum in the Serfass case (95 S.Ct. 1055). The Court totally ignored the principles announced in Illinois v. Somerville, 410 U.S. 458, 93 S. Ct. 1066, 36 L. Ed. 2'd 424 (1973), U.S. v. Jorn, 400 U.S. 470, 91 S.Ct. 547, 27 L. Ed. 543 (1971), and Downum v. U.S., 372 U.S. 734, 83 S. Ct. 1033, 10 L. Ed. 2'd 100 which hold clearly that jeopardy attaches when the jury is selected and sworn.

The present opinion of the Court of Criminal Appeals (Appendix A, pp. 11 - 17) is unreported, and yet finally, after many years, the Court has faced the issue of the conflict between the federal and state law. The Court recognizes that the double jeopardy clause of the 5th Amendment is applicable to the States through the 14th Amendment. (Appendix A, p. 11), citing Duckett v. State, 454 S.W. 2'd 755 (Tex.Cr.App. 1970) and Taylor v. State, 474 S.W. 2'd 207 (Tex.Cr.App. 1972). The court then recognizes the federal attachment of jeopardy rule, citing Illinois, Jorn, and Downum. And yet, the court again refuses to overturn the Texas rule, finding "no compelling reason" to do so. The compelling reason should be the supremacy of this Court and its decisions in this field which have been so often ignored by the State of Texas.

The federal rule for the attachment of jeopardy should apply to the States uniformly, because the rights under the Double Jeopardy Clause are protected as a "fundamental ideal in our constitutional heritage." Benton v. Maryland, 395 U.S.

784, 89 S.Ct. 2056, 23 L.Ed. 2d 707. The stage at which jeopardy attaches is not one merely seized by this Court as a matter of procedure or convenience, but as an important and critical time when a defendant's life and liberty is placed in the hands of twelve people who are charged to hear his case.

The idea underlying the constitutional prohibition against double jeopardy is that the State with all its resources and powers should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense, and ordeal and compelling him to live in a continued state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty. Green v. U.S., 78 S.Ct. 221, 355 U. S. 184, 2 L.Ed. 2d 199, 61 ALR 2d 1119. Please consider the effect upon a defendant, as in Petitioner's case, where the district attorney is allowed to wait until the jury is selected and sworn and the defendant has prepared extensively for trial, including eleven subpoenas issued, six motions filed, and voir dire of the jury, and then the district attorney moves for a dismissal for no other reason than to improve his position brought about by his own neglect. The Petitioner's prior convictions were on file and indexed in the District Clerk's office in Angelina County, Texas, only a few feet away from the district attorney's office, not to mention the state records available to the prosecutor. The prosecutor had over four months, from September, 1974 until February, 1975, to have the indictment read as he wished and to prepare his case. This is the same type of sloppy prosecutorial preparation condemned in Downum, McNeal v. Hollowell, 481 F 2d 1145, cert.den. 94 S.Ct. 1476 (1973), and in U.S. v. Glover, 506 F 2d 291 (1974), wherein the court said that the means for the prosecution to protect its legitimate interest was at hand, and that the decision should alert prosecutors to enlist the willing aid of the trial courts fully before the jury comes into the box.

Considering the serious consequences of the prosecutor's manipulation of the court system, as shown in Petitioner's case, this court cannot afford to hold that the State of Texas or any other state may provide for a different and later stage at which jeopardy attaches. The federal rule is a "product of constitutional exegesis" and the "lynchpin for all double jeopardy jurisprudence." Bretz v. Crist, supra. This Court in Illinois v. Somerville recognized that federal standards control in a state prosecution, as in Breed v. Jones, 421 U.S. 519, 95 S.Ct. 1779, 44 L.Ed 2d 346 (1975). Petitioner urges this court to follow the sound reasoning of the Bretz v. Crist court, in the spirit of the Constitution of the United States, and with strong consideration given to the "valued right of the accused to have his trial completed by a particular tribunal which he believes may be favorably disposed to his fate." Jorn, supra.

As to whether manifest necessity existed for the discharge of Petitioner's first jury so as to allow retrial, the facts are clear. The sole reason for the prosecutor's motion was to allow the state to reindict petitioner and allege prior felony convictions, for the sole purpose of enhancing the punishment. Petitioner objected to the discharge. The judge made a decision without taking the time to seriously consider the countervailing interests of Petitioner. See Smith v. Mississippi, 478 F 2d 88 cert. den. 94 S.Ct. 844 (1973). The mistrial was granted for the benefit of the prosecutor and not petitioner, and petitioner did nothing to bring it about. See U.S. v. Glover, 506 F 2d 291 (1974). The district attorney was guilty of sloppy prosecutorial preparation. See McNeal v. Hollowell, 481 F 2d 1145, cert. den. 94 S.Ct. 1476 (1973), and Downum v. U.S., supra. The state was allowed to strenthen its case against Petitioner. See U. S. v. Kin Ping Cheung, 485 F 2d 689 (1973). The trial court did not consider the alternative, that the district attorney would still be allowed under Texas law to present the

prior convictions of petitioner to the jury at the punishment stage of the trial and ask for a higher punishment on that basis. See U.S. v. Jorn, supra. The dismissal was one which lent itself to prosecutorial manipulation. See Illinois v. Somerville, supra, and Downum v. U.S., supra. There was no important countervailing interest of proper judicial administration. See Russo v. Superior Court of New Jersey, 483 F 2d 7, cert. den., 94 S.Ct. 447, 414 U.S. 1023, 38 L. Ed 2d 315. The trial court could not have granted a mistrial without the State's motion for the reason given.

The fact that no manifest necessity was present for the aborting of the trial by the judge is clear. However, if there be any doubt, under Downum, it must be resolved in favor of the liberty of the citizen.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Texas Court of Criminal Appeals.

Respectfully submitted,

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